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Supreme Court of the United States

October Term, 1967

No. 802

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Petitioner,

v.

ROBERT ELMER ROWE,

Respondent.

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Petitioner,

v.

CLYDE MASON THACKER,

Respondent.

REPLY BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

The Superintendent of the Virginia State Penitentiary, by counsel, files herewith his reply brief to the brief filed on behalf of the respondents. The respondents have sug-

gested that the wrong statute will be found on page 3 of the petitioner's opening brief, to-wit: 28 U.S.C., Section 2254. The petitioner would suggest that in addition to 28 U.S.C., Section 2254; 28 U.S.C., Section 2241 is also applicable to this case, and the same is herein set forth.

OTHER STATUTE INVOLVED

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or ex-

emption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 112, 63 Stat. 105." (28 U.S.C., Section 2241).

ARGUMENT

I.

The Writ Does Not Lie, for the Reason That the Prisoners Are Not in Custody Under the Convictions Which They Attack.

The principal contention of the prisoners in their brief initially is to the effect that their sentences are invalid and that they state a prima facie case in their petitions. With this we have previously agreed, and it is therefore unnecessary to consider that which is said in the first eighteen pages of the respondents' brief.

It is noted with a great deal of interest that on page 18 of the respondents' brief they complain of delays in the judicial process. There are inherent delays in bringing a case on for plenary hearing, but the delays in the Federal system far exceed the delays in the courts of the Commonwealth of Virginia. A prisoner can expect to receive a plenary hearing within 45 to 60 days after the respondent has filed an answer. In the Federal courts, the delay sometimes is six months to a year from the time of the filing of the answer by the Attorney General of Virginia. Delay is unfortunate, but it is caused by the fact that the majority of the petitions filed are frivolous, but hearings must be held in connection with the same.

The comments made by respondents in their brief commencing on page 20 are most interesting, but unsupported

by any evidence in the record before this Court. There was no testimony or evidence relative to the methods of classification employed in the Virginia penal system. There was no testimony relative to the type of institutions operated in Virginia for the incarceration of convicted felons and misdemeanants. Indeed, there is no such thing as an "Honor Camp" mentioned on page 21 of the respondents' brief. It is submitted that the argument contained on page 20 through 25 of the respondents' brief is unsupported by any credible evidence in the record before this Court and that the same should be disregarded.

The principal point in this case is the fact that the prisoners are not "in custody" under the sentences of which they complain. The prisoners are not therefore restrained of their liberty by the sentences which they attack. This Court has consistently held to the doctrine that the prisoner must be "in custody" in order to attack a sentence either by way of habeas corpus or by the provisions of 28 U.S.C., Section 2255. *McNally* v. *Hill,* 293 U.S. 131 (1934); *Holiday* v. *Johnston,* 313 U.S. 342 (1941); *Heflin* v. *United States,* 358 U.S. 415 (1959); *Fay* v. *Noia,* 372 U.S. 391; *Jones* v. *Cunningham,* 371 U.S. 236 (1963).

If this rule of law is to be changed, it is submitted that the appropriate approach is that undertaken by the Commonwealth of Virginia, whose Legislature has just recently adjourned. The Senate of Virginia and the House of Delegates passed Senate Bill No. 44, which has not yet been signed by the Governor, and is therefore not the law of the Commonwealth at the time this brief is being prepared. The bill will be signed by the President of the Senate and the Speaker of the House of Delegates on March 29, 1968, and thereafter will presumably be signed by the Governor of Virginia. The Court will be notified when the same is

accomplished. For the convenience of the Court, Senate Bill 44, as passed by the Virginia legislature, will be found in the appendix to this brief. Virginia by enacting this statute and amending the provisions of Section 8-596 of the Code of Virginia has provided that a prisoner may attack a sentence which is to be served in the future. This legislation deals effectively with all the problems so ably presented in the respondent's brief. It is manifest, therefore, that if the doctrine of *McNally* is to be altered, the same should be accomplished by an appropriate act of Congress and not by judicial legislation.

The writ of habeas corpus is limited by the provisions of 28 U.S.C. 2254 to cases wherein the prisoner is "in custody" under the sentence which he attacks. In both of the cases before this Court, the prisoner is serving another sentence other than the sentence of which he complains.

This matter is not governed by this Court's decision in *Case* v. *Nebraska,* 380 U.S. 924 (1965). This Court is being called upon to enlarge the scope of the writ of habeas corpus, and this is admitted by the opinion of the United States Court of Appeals for the Fourth Circuit, wherein it is stated that its decision represents "a significant departure from the historic conception that the writ of habeas corpus was available only if the Court's order would procure the immediate release of the prisoner."

This most drastic step, which is suggested by the respondents should not be made by this Court, for the respondents seek judicial amendment of an act of congress. If Congress desires to change the rule in *McNally,* it can do so in the same manner that the Virginia General Assembly has accomplished the same.

For these reasons, it is submitted that the decision of the court below should be reversed.

II.

The Prisoners Are Not Entitled to Declaratory Relief.

It is suggested by respondents' opening brief that the habeas corpus petitions should be treated as petitions for relief by way of declaratory judgment. The Federal Declaratory Judgment Act, 28 U.S.C. 2201, provides as follows:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

This very argument was advanced in the United States Court of Appeals for the Fourth Circuit in *Martin* v. *Virginia,* 349 F. 2d 781 (4th Cir., 1965). The argument was rejected.

In order for a Federal Court to consider a motion for declaratory judgment, the same must present a case that is appropriate for judicial determination. Here, there is no concrete case admitting of an immediate and definitive determination of the legal rights of the parties. *Aetna Life Insurance Company* v. *Haworth,* 300 U.S. 227 (1937). There is nothing in the Federal Declaratory Judgment Act itself which would lead this Court to determine that this question of the validity of a prisoner's sentence to be served in the future should be open in a declaratory judgment proceeding.

In the case of *Clark* v. *Memolo,* 174 F. 2d 978 (D.C. Cir., 1949), the Court observed "It is well settled that the

Declaratory Judgment Act does not confer or extend jurisdiction over an area not already covered, nor can it be used to give relief indirectly which could not be given directly. It does not enlarge the jurisdiction of the District Courts. * * *"

Moreover, in *Hurley* v. *Lindsay,* 207 F. 2d 410 (4th Cir., 1953), the Court said:

> "* * * As was well said by Judge Watkins, speaking for the Court of Appeals of the District of Columbia Circuit in *Clark* v. *Memola,* 85 U.S. App. D.C. 65, 174 F. 2d 978, 981, 'It was the primary purpose of the [Declaratory Judgment] act, [28 U.S.C.A. §§ 2201, 2202] to have a declaration of rights not theretofore determined, and not to determine whether rights theretofore adjudicated have been properly adjudicated.' "

Here, it is quite clear that the rights of these inmates have been previously adjudicated. They have both been tried and convicted by competent courts of the Commonwealth of Virginia. It was clearly not the intention of Congress to permit a readjudication of rights under the Federal Declaratory Judgment Act. It is only by way of habeas corpus that a prisoner can attack the validity of a judgment. In the absence of a "case or controversy" it is therefore manifest that the provisions of the Federal Declaratory Judgment Act may not be employed as a substitute for a writ of habeas corpus.

CONCLUSION

It is submitted that it has been demonstrated clearly and concisely that the prisoners are not "in custody" and that consequently the writ of habeas corpus does not lie in a Federal Court. Moreover, it has been demonstrated that the court below departed from established principles of

law enunciated by this Court, which principles have been followed for many years by this Court and by other Circuit Courts of Appeals. It is manifest that if any change should be made, such change should be made by Congress.

For these reasons, it is respectfully submitted that the judgments of the court below should be reversed.

Respectfully submitted,

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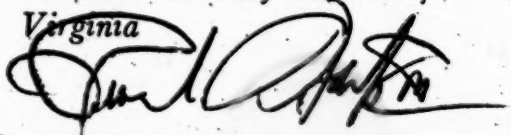
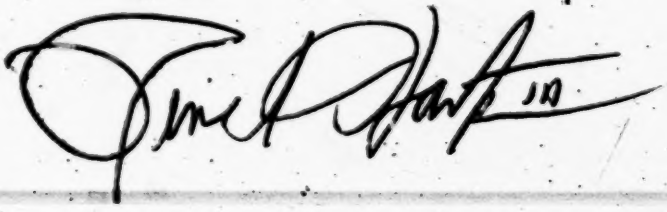


CERTIFICATE OF SERVICE

I, Reno S. Harp, III, an Assistant Attorney General of Virginia, counsel for the Superintendent in the captioned matter, and a member of the bar of the Supreme Court of the United States, do hereby certify that on this 22nd day of March, 1968, I mailed a copy of the foregoing Brief by first class mail to Mr. John J. Kirby, Jr., 4201 31st Street, Apartment 808, Arlington, Virginia, and Mr. Thomas S. Currier, University of Virginia, School of Law, Charlottesville, Virginia, counsel for the respondents herein.

RENO S. HARP, III
Assistant Attorney General of Virginia



APPENDIX

Be it enacted by the General Assembly of Virginia:

1. That § 8-596, as amended, of the Code of Virginia be amended and reenacted as follows:

§ 8-596. When and by whom the writ granted; what petition to contain.—(*a*) The writ of habeas corpus ad subjiciendum shall be granted forthwith by any circuit court or corporation court, or any judge of either in vacation, to any person who shall apply for the same by petition, showing by affidavits or other evidence probable cause to believe that he is detained without lawful authority.*

* * *

(*b*) (*1*) *With respect to any such petition filed by a petitioner held under criminal process, and subject to the provisions of § 17-97 of the Code of Virginia, only the court ~~or~~ any judge thereof in vacation which entered the original judgment order of conviction or convictions complained of in the petition shall have authority to issue writs of habeas corpus. Hearings on such petition, where granted in the original trial court, may be held at any court within the circuit or corporation of such original trial court as designated by the judge thereof.*

(*2*) *Such petition shall contain all allegations the facts of which are known to petitioner at the time of filing and such petition shall enumerate any and all previous applications of like nature and their disposition. No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition.*

(*3*) *Such petition may allege detention without lawful authority through challenge to a conviction, although the sentence imposed for such conviction is suspended or is to*

be served subsequently to the sentence currently being served by petitioner.

(4) In the event the allegations of illegality of the petitioner's detention can be fully determined on the basis of recorded matters, the court or judge thereof in vacation may make its determination whether such writ should issue on the basis of the record.

(5) Such court or judge shall give his findings of fact and conclusions of law following his determination on the record or after hearing, to be made a part of the record and transcribed.

(6) If petitioner alleges as a ground for illegality of his detention the inadequacy of counsel, he shall be deemed to waive his privilege with respect to communications between such counsel and himself to the extent necessary to permit a full and fair hearing for the alleged ground.